

IN THE CHANCERY COURT FOR DAVIDSON COUNTY, TENNESSEE FOR THE TWENTIETH
JUDICIAL DISTRICT AT NASHVILLE

STATE OF TENNESSEE,
Petitioner,

v.

FIREWORKS SUPERMARKET
TENNESSEE OPERATIONS, INC.,
a Tennessee corporation,

Respondent.

ASSURANCE OF VOLUNTARY COMPLIANCE

THIS ASSURANCE OF VOLUNTARY COMPLIANCE (AAssurance@) is given by FIREWORKS SUPERMARKET-TENNESSEE OPERATIONS, INC., a Tennessee corporation located in Murfreesboro, Tennessee (ARespondent@), to PAUL G. SUMMERS, Attorney General and Reporter for the State of Tennessee (AAttorney General@) on behalf of the Tennessee Division of Consumer Affairs of the Department of Commerce and Insurance (ADivision@).

WITNESSETH:

Some of the facts and circumstances surrounding the execution of this Assurance are as follows:

A. The Division and the Attorney General conducted an investigation of specific business practices of Respondent. These practices include an advertisement placed in the *Murfreesboro Daily News Journal* on July 2, 1999. The advertisement warned consumers not to visit Aour tents@ because rainfall and other weather conditions had allegedly made them Aunsafe@ for consumers to visit. The advertisement instead directed consumers to visit Respondent's store. However, Respondent did not actually have any tent locations. Respondent's business practices are more fully described in the State's Petition. As a

result of the investigation, the Division and the Attorney General determined that certain acts and practices of Respondent violated the Tennessee Consumer Protection Act of 1977, Tenn. Code Ann. §§ 47-18-101, *et seq.* (the AAct@).

B. Respondent denies any wrongdoing, but nonetheless desires to resolve the issues raised in order to avoid expensive litigation. Further, pursuant to section 47-18-107(c) of the Tennessee Code Annotated, acceptance of this Assurance by Respondent shall not be considered an admission of a prior violation of the Act.

C. Therefore, pursuant to section 47-18-107 of the Tennessee Code Annotated, Respondent desires to give this Assurance, and the Attorney General desires to accept it, in order to avoid the expense of litigation.

NOW, THEREFORE, acting pursuant to section 47-18-107 of the Tennessee Code Annotated, Respondent gives, and the Attorney General accepts, the following assurances:

I. DEFINITIONS

As used in this Assurance and accompanying Agreed Order, the following words or terms shall have the following meanings:

1.1 AAssurance of Voluntary Compliance@ or AAssurance@ shall refer to this document entitled Assurance of Voluntary Compliance in the matter of *State of Tennessee v. Fireworks Supermarket-Tennessee Operations, Inc.*

1.2 AConsumer@ means any person, a natural person, individual, governmental agency or other entities, partnership, corporation, trust, estate, incorporated or unincorporated association, and any other legal or commercial entity however organized.

1.3 ADivision@ or ADivision of Consumer Affairs@ shall refer to the Tennessee Division of Consumer Affairs of the Department of Commerce and Insurance.

1.4 ARespondent@ shall refer to Fireworks Supermarket-Tennessee Operations, Inc., and/or any and all officers, owners, employees, agents and representatives of Fireworks Supermarket-Tennessee Operations, Inc.

1.5 APetitioner,@ AState of Tennessee,@ or AAttorney General@ shall refer to the Office of the Tennessee Attorney General and Reporter.

1.6 ATennessee Consumer Protection Act@ or AAct@ shall refer to the Tennessee Consumer Protection Act of 1977 and related statutes found at Tenn. Code Ann. §§ 47-18-101, *et seq.*

II. JURISDICTION

2.1 Jurisdiction of this Court over the subject matter herein and over the person of the Respondent for the purposes of entering into and enforcing this Assurance and Agreed Order is admitted. Jurisdiction is retained by this Court for the purpose of enabling Petitioner to apply for such further orders and directions as may be necessary or appropriate for the construction, modification or execution of this Assurance and Agreed Order, including enforcement of compliance therewith and assessment of penalties for violation(s) thereof. Respondent agrees to pay all court costs and attorneys' fees and any costs associated with any petitions to enforce any provision of this Assurance and Agreed Order against Respondent if the State is the successful party.

III. VENUE

3.1 Pursuant to section 47-18-107 of the Tennessee Code Annotated, venue as to all matters between the parties relating hereto or arising out of this Assurance is solely in the Chancery Court of Davidson County, Tennessee.

IV. PERMANENT INJUNCTION

Accordingly, it is hereby agreed that upon approval of the Court, Respondent shall be permanently and

forever enjoined and bound from directly or indirectly engaging in the practices set forth herein:

4.1 Respondent shall be prohibited from directly or indirectly engaging in any misleading, unfair or deceptive acts or practices in the conduct of its business. Respondent shall fully comply with all provisions of the Tennessee Consumer Protection Act of 1977, Tenn. Code Ann. §§ 47-18-101, *et seq.*, including but not limited to sections 47-18-104(a) and (b)(27), which prohibit unfair and deceptive acts and practices.

4.2 Respondent shall be prohibited from directly or indirectly representing that Respondent has tent fireworks locations, when such is not the case.

4.3 Respondent shall be prohibited from directly or indirectly falsely disparaging the business locations of his competitors.

4.4 Respondent shall be prohibited from directly or indirectly representing that inventory has been damaged by weather conditions if (1) Respondent does not own the particular facility described or (2) Respondent does not possess written and verifiable substantiation of the damage at a particular facility. Such substantiation shall be made available to the State at the Office of the Attorney General in Nashville, within two (2) days of a written request.

4.5 Respondent shall be prohibited from directly or indirectly representing that it is unsafe to visit tent-fireworks facilities unless Respondent has written verifiable scientific substantiation for that claim. Such substantiation shall be made available to the State at the Office of the Attorney General in Nashville, within two (2) days of a written request.

4.6 Respondent shall be prohibited from directly or indirectly representing that inventory is unsafe unless Respondent has written verifiable scientific substantiation for that claim. Such substantiation shall be made available to the State at the Office of the Attorney General in Nashville, within two (2) days of a written request.

4.7 Respondent shall be prohibited from directly or indirectly, offering a prize, gift or award to Tennessee consumers without fully complying with section 47-18-120 of the Tennessee Code Annotated.

4.8 In the initial solicitation and each solicitation thereafter, Respondent shall be required to clearly and conspicuously disclose the verifiable retail value of any prize, gift, award, incentive promotion or other items offered AFree@ to consumers.

4.9 Respondent shall be required to fully comply with the Federal Trade Commission Guide Concerning Use of the Word AFree@ and Similar Representations Guidelines, 16 C. F. R. 251.

V. RESTITUTION REPRESENTATION

5.1 Respondent represents and warrants that with the exception of the Midamerica Distributors, Inc., no consumers have complained to Respondent about its advertisement in the July 2, 1999 edition of the *Daily News Journal*. Further, Respondent represents and warrants that no consumer, except as identified above, has requested a refund or restitution from Respondent with regard to the advertisement. Respondent understands that Petitioner expressly relies upon this representation; if it is false, misleading, deceptive, incomplete or unfair in any way, Petitioner may move to set aside this Assurance or request that the Respondent be held in contempt.

5.2 Respondent further represents and warrants that the advertisement in the July 2, 1999, edition of the *Daily News Journal* is the only advertisement published by the Respondent that included references to Aour tents@ and inventory being Aunsafe.@ Respondent understands that Petitioner expressly relies upon this representation; if it is false, misleading, deceptive, incomplete or unfair in any way, Petitioner may move to set aside this Assurance or request that Respondent be held in contempt.

VI. PAYMENT OF ATTORNEYS' FEES AND COSTS TO THE STATE

6.1 Respondent shall pay the sum of One Thousand Five Hundred and 00/100 Dollars (\$ 1,500.00) to the State of Tennessee for attorneys' fees and costs of investigation, prosecution and monitoring for compliance of this matter, which may be used for consumer protection purposes at the sole discretion of the Attorney General. Payment shall be made by providing the Attorney General or his designated representative a cashier's or certified check made payable to the State of Tennessee on the day of execution of this Assurance.

VII. CIVIL PENALTIES

7.1 Respondent shall pay the sum of Two Thousand Five Hundred and 00/100 Dollars (\$ 2,500.00) to the State of Tennessee as a civil penalty pursuant to section 47-18-108(b)(3) of the Tennessee Code Annotated. Payment shall be made by providing the Attorney General or his designated representative a cashier's or certified check made payable to the State of Tennessee on the day of execution of this Assurance.

VIII. MONITORING FOR COMPLIANCE

8.1 Upon request, Respondent agrees to provide books, records and documents to Petitioner at any time, and further, to informally or formally under oath, provide testimony and other information to Petitioner relating to compliance with this Assurance. Respondent shall make any requested information available within one (1) week of the request, at the Office of the Attorney General or at any other location within the State of Tennessee that is mutually agreeable in writing to Respondent and the Attorney General. This section shall in no way limit Petitioner's right to obtain documents, information, or testimony pursuant to any federal or state law, regulation, or rule.

8.2 The State of Tennessee has the right to test shop Respondent for the purpose of confirming

compliance with this Assurance and state law. The test shoppers are not required to disclose that they are representatives of the State of Tennessee when making contact with Respondent. Further, the State of Tennessee may record any or all aspects of its visit(s) to Respondent in audio or video form without notice to Respondent.

IX. PRIVATE RIGHT OF ACTION

9.1 Pursuant to sections 47-18-109 and 47-18-108(e) of the Tennessee Code Annotated, nothing in this Assurance shall be construed to affect any private right of action that a consumer or any other person may hold against Respondent.

X. PENALTY FOR FAILURE TO COMPLY

10.1 Respondent understands that upon execution and filing of this Assurance, any subsequent failure to comply with the terms hereof is *prima facie* evidence of a violation of the Tennessee Consumer Protection Act.

10.2 Respondent understands that any knowing violation of the terms of this Assurance shall be punishable by civil penalties of not more than one-thousand dollars (\$1,000.00) for each violation, in addition to any other appropriate penalties and sanctions, including but not limited to contempt sanctions and the imposition of attorneys' fees and civil penalties. Respondent agrees to pay all court costs and attorneys' fees associated with any petitions to enforce this Assurance and Order against the Respondent, if the State is the successful party.

XI. REPRESENTATIONS AND WARRANTIES

11.1 Respondent represents and warrants that the execution and delivery of this Assurance is its free and voluntary act, that this Assurance is the result of good faith negotiations, and that Respondent agrees that the Assurance and terms hereof are fair and reasonable. The parties warrant that they will implement the terms of this Assurance in good faith. Further, no offer, agreements, or inducements of any nature whatsoever have been made to it by the State of Tennessee, its attorney or any employee of the Attorney General's Office or the Division of Consumer Affairs to procure this Assurance.

11.2 Respondent represents that signatories to this Assurance have authority to act for and bind Respondent.

11.3 Respondent will not participate, directly or indirectly, in any activity to form a separate entity or corporation for the purpose of engaging in acts prohibited in this Assurance or for any other purpose which would otherwise circumvent any part of this Assurance or the spirit or purposes of this Assurance.

11.4 Neither Respondent nor anyone acting on its behalf shall state or imply or cause to be stated or implied that the Attorney General, the Division of Consumer Affairs, the Department of Commerce and

Insurance, or any other governmental unit of the State of Tennessee approved, sanctioned, or authorized any practice, act, or conduct of the Respondent.

11.5 Acceptance of this Assurance by Petitioner shall not be deemed approval by Petitioner of any of Respondent's advertising or other business practices.

11.6 Within thirty (30) days of the entry of this Assurance, Respondent shall submit a copy of this Assurance to each of its officers, directors, employees and any third parties who act directly or indirectly on behalf of the Respondent as an agent, independent contractor or who are involved in conducting business in the State of Tennessee. Within forty-five (45) days of entry of this Assurance, Respondent shall provide the State with an affidavit verifying and certifying that all required persons have been supplied with a copy of this Assurance.

11.7 Respondent warrants and represents that it is the proper party to this Assurance and Order. Respondent further acknowledges that Petitioner expressly relies upon this representation and warranty, and that if it is false, misleading, deceptive, unfair or inaccurate, Petitioner has the right to move to vacate or set aside this Assurance and Agreed Order, and request that Respondent be held in contempt, if Petitioner so elects.

11.8 Respondent represents that Fireworks Supermarket-Tennessee Operations, Inc. is the true legal name of the entity entering into this Assurance of Voluntary Compliance and Agreed Order. Respondent understands that Petitioner expressly relies upon this representation and if this representation is false, unfair, deceptive, inaccurate or misleading, Petitioner shall have the right to move to vacate or set aside this Assurance and Agreed Order, and request that Respondent be held in contempt, if Petitioner so elects.

11.9 This Assurance and Agreed Order may be enforced only by the parties hereto.

11.10 The titles and headers to each section of this Assurance are for convenience purposes only and are not intended by the parties to lend meaning to the actual provisions of the Assurance.

11.11 This document shall not be construed against the Adrafter@ because both parties participated in the drafting of this document.

11.12 This Assurance and Agreed Order constitutes the complete agreement of the parties with regard to the resolution of the matters set forth in the State's Petition. This Assurance is limited to resolving only matters set forth in the State's Petition.

11.13 Nothing in this Assurance shall be construed to limit the authority of the Attorney General to protect the interests of the State or the people of the State of Tennessee. In addition, this Assurance shall not bar the State, a District Attorney General or other governmental entity from enforcing laws, regulations or rules against Respondent.

11.14 This Assurance shall be binding and effective against Respondent upon Respondent's execution of the Assurance. In the event the court does not approve this Assurance, this Judgment shall be of no force and effect against the State of Tennessee or the Respondent.

11.15 Respondent has been advised of its right to legal counsel in connection with this matter. If Respondent declines to obtain the assistance of legal counsel, Respondent has expressly waived its right to counsel by executing this Assurance.

11.16 Nothing in this Assurance constitutes an agreement by the State of Tennessee concerning the characterization of the amounts paid hereunder for purposes of any proceeding under the Internal Revenue Code or any state tax laws.

XII. COMPLIANCE WITH ALL LAWS, REGULATIONS AND RULES

12.1 Nothing in this Assurance and Order shall be construed as relieving Respondent of the obligation to comply with all state or federal laws, regulations or rules.

XIII. FILING OF ASSURANCE

13.1 Upon the execution of this Assurance, the Attorney General shall prepare and file in the Chancery Court for Davidson County a Petition, Agreed Order and this Assurance for the Court's approval. Respondent hereby waives any and all rights which it may have to be heard in connection with judicial proceedings upon the Petition. Respondent agrees to pay all costs of filing such Petition, Assurance and Agreed Order. Simultaneously with the execution of this Assurance, Respondent shall execute an Agreed Order. This Assurance is made a part of and is incorporated into the Agreed Order. The Respondent agrees that it consents to the entry of this Assurance and Agreed Order without further notice.

XIV. APPLICABILITY OF ASSURANCE TO RESPONDENT

AND ITS SUCCESSORS

14.1 Respondent agrees that the duties, responsibilities, burdens and obligations undertaken in connection with this Assurance shall apply to it, each of its officers, directors, managers, agents, assigns, representatives, employees, partners, subsidiaries, affiliates, parents, related entities, joint venturers, persons or other entities it controls, manages or operates, its successors and assigns, and to other persons or entities acting directly or indirectly on its or their behalf.

XV. NOTIFICATION TO STATE

15.1 Any notices required to be sent to the State or the Respondent by this Assurance shall be sent by United States mail, certified mail return receipt requested or other nationally recognized courier service that provides for tracking services and identification of the person signing for the document. The documents shall be sent to the following addresses:

For the State:

CYNTHIA E. KINSER Deputy Attorney General
Consumer Protection Division
425 Fifth Avenue North, 2nd Floor
Nashville, Tennessee 37243

For the Respondent:

PHIL LOYD
Fireworks Supermarket-
Tennessee Operations, Inc.
2030 South Church
Murfreesboro, TN 37130

15.2 For five (5) years following execution of this Assurance, Respondent shall notify the Office of the Attorney General, in writing, at least thirty (30) days prior to the effective date of any proposed changes in its corporate structure, such as dissolution, assignment, or sale resulting in the emergence of a successor corporation or firm, the creation or dissolution or subsidiaries, or any other changes in Respondent's status that may effect compliance with obligations arising out of this Assurance.

XVI. COURT COSTS

16.1 All costs associated with the filing and distribution of this Assurance and any other incidental costs or expenses incurred thereby shall be borne by Respondent. No costs shall be taxed against the State as provided by section 47-18-116 of the Tennessee Code Annotated. Further, no discretionary costs shall be taxed to the State.